BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH TRUNDLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 182,555
U.S.D NO. 415	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOCIATION OF SCHOOL BOARDS	)	
WORKERS COMPENSATION FUND, INC.	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Review was sought by respondent and its insurance carrier of the Award entered by Special Administrative Law Judge Douglas F. Martin on September 5, 1996.

APPEARANCES

The claimant settled her claim, leaving only the respondent , its insurance carrier and the Workers Compensation Fund as the parties to this appeal. The respondent and its insurance carrier appeared by and through their attorney, David F. Menghini of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Mark W. Works, of Topeka, Kansas.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Special Administrative Law Judge, with the addition of the transcript of the settlement hearing held October 5, 1993, before Special Administrative Law Judge Jerry R. Shelor.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review with the added stipulations as to the nature and extent of claimant's disability, to the reasonableness of the October 5, 1993, settlement, and that respondent filed a Form 88 Notice of Handicap, Disability or Physical Impairment on April 25, 1991, as to claimant's back injury.

ISSUES

The Administrative Law Judge denied respondent's request to assess 100 percent liability against the Kansas Workers Compensation Fund (Fund) finding instead that the Fund should not be responsible for any of the benefits awarded claimant as a result of the back injury claimant sustained on December 11, 1991. Fund liability is the sole issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Special Administrative Law Judge should be reversed.

The facts are uncontroverted. Claimant had injured his back in a prior accident on January 1, 1991. After missing 57 work days from his job with respondent, claimant was released to return to work by the authorized treating physician. On December 11, 1991, claimant suffered an aggravation of his condition from a slip-and-fall injury at work. The Appeals Board finds claimant's present disability would not have occurred but for his preexisting impairment. Accordingly, 100 percent of the award should be assessed against the Fund.

The purpose of the Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

> "'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the

> employee should become unemployed and the handicap is due to any of the following diseases or conditions: . . .
> "15. Loss of or partial loss of the use of any member of the body;
> "16. Any physical deformity or abnormality;
> "17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1991 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. See K.S.A. 1991 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1991 Supp. 44-567(b) provides:

> "In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to this former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), *Aff'd* 242 Kan 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Kansas Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra*.

The Special Administrative Law Judge was unable to find any evidentiary basis to support a finding that claimant was a handicapped employee at the time of his December 11, 1991, slip-and-fall injury at work. However, the parties had stipulated at regular hearing that respondent had filed a Form 88 Notice of Handicap, Disability or Physical Impairment with the

Division of Workers Compensation concerning claimant's prior back injury. That is the same back injury that caused claimant to miss 57 work days with respondent that same year and caused Dr. Phillip Baker to recommend a 50-pound lifting restriction on claimant. As a result, respondent filed the Form 88 on April 25, 1991, prior to the December 11, 1991, accident that is the subject of this claim. Dr. John Severin, Assistant Superintendent for the respondent school district, testified that the Form 88 was prepared because of ongoing low back complaints expressed by claimant following his January 1991 injury. From the above, the Appeals Board finds that at the time of claimant's injury, respondent had knowledge of a preexisting impairment that would constitute a handicap in obtaining employment.

In this case before us, the Fund also argues that the opinion of orthopedic surgeon Phillip L. Baker, M.D., should be rejected and respondent found not to have carried its burden of proof that claimant's disability probably would not have occurred but for his preexisting impairment because Dr. Baker's opinion was speculative.

K.S.A. 1991 Supp. 44-567(a)(2) provides that liability of the Workers Compensation Fund shall be determined "in a manner which is equitable and reasonable . . . ." It does not prescribe the requisite evidence the trier of fact must follow. Expert testimony from a physician is certainly helpful but it is not necessarily required, nor is it always to take a certain form.

Dr. Baker treated claimant both before and after his December 1991 injury. His diagnosis in April 1991 was a 15 percent spondylolisthesis at L5-S1. Thereafter, as a result of claimant's December 1991 injury, surgery was performed on March 13, 1992, to fuse the spine at L5-S1. Dr. Baker testified that in his opinion claimant's work-related accident and subsequent surgery would not have occurred but for the preexisting condition. His opinion was unequivocal and is accepted by the Board as competent and reasonable.

Dr. Baker felt comfortable giving an opinion based upon a reasonable degree of medical certainty to the effect that but for claimant's preexisting impairment the second accident would not have occurred. The fact that Dr. Peter V. Bieri was of a different opinion concerning the percentage of impairment that preexisted is of little consequence to the issue of Fund liability and does not refute Dr. Baker's opinion on the Fund liability issue. To the contrary, Dr. Bieri agreed with Dr. Baker that claimant's work-related injury and resulting surgery most likely would not have occurred but for the preexisting condition. The Appeals Board finds Dr. Baker's testimony to be persuasive on the issue of Fund liability. Based upon the record as a whole, the Appeals Board finds that liability for the cost of the settlement award for the accident of December 11, 1991, should be assessed 100 percent against the Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Douglas F. Martin dated September 5, 1996,

should be, and hereby is, reversed and 100 percent of the cost of the settlement award entered October 5, 1993, by Special Administrative Law Judge Jerry R. Shelor is assessed against the Workers Compensation Fund.

Fees necessary to defray the expenses of administration of the Worker's Compensation Act are hereby assessed against the Fund:

Nora Lyon & Associates Transcript of Regular Hearing dated August 23, 1995	$ 64.60
Hostetler & Associates, Inc. Deposition of Dr. John Severin	$ 87.80
Curtis, Schloetzer, Hedberg, Foster & Associates Deposition of Peter V. Bieri, M.D.	$173.40
Metropolitan Court Reporters, Inc.	Unknown
Douglas F. Martin Special Administrative Law Judge Fee	$150.00

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David F. Menghini, Kansas City, Kansas
Mark W. Works, Topeka, Kansas
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director